

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TAD S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C24-5657-BAT

**ORDER REVERSING AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE PROCEEDINGS**

Plaintiff Tad S. appeals the denial of his application for Supplemental Security Income, arguing the ALJ misevaluated the medical evidence and plaintiff's testimony, and the resulting residual functional capacity finding and finding of nondisability are erroneous; he seeks remand for an award of benefits or, in the alternative, for further administrative proceedings. Dkt. 15. The Commissioner concedes the ALJ committed harmful error but contends a remand for further administrative proceedings is the appropriate remedy. Dkt. 23. The Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

**BACKGROUND**

Plaintiff is currently 60 years old and was 54 years old on the date he filed the application; he has a high school education and has no past relevant work. Tr. 44-45. He applied

1 for benefits with a protective filing date of March 19, 2019, alleging disability since January 1,  
2 2007. Tr. 31-32, 346. After his application was denied initially and on reconsideration, the ALJ  
3 held a hearing and, on April 27, 2021, issued a decision finding plaintiff not disabled. Tr. 185-98.  
4 The Appeals Council reversed that decision, remanding the case to the ALJ to issue a new  
5 decision. Tr. 205-06. The ALJ held a second hearing and, on October 11, 2023, issued a second  
6 decision finding plaintiff not disabled. Tr. 31-46. Plaintiff now seeks review of the ALJ's  
7 October 2023 decision.

### 8 THE ALJ'S DECISION

9 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found plaintiff had not  
10 engaged in substantial gainful activity since the application date; he had the following severe  
11 impairments: degenerative disc disease of the lumbar spine, bipolar disorder, anxiety, and PTSD;  
12 and these impairments did not meet or equal the requirements of a listed impairment. Tr. 34-35.  
13 The ALJ found plaintiff had the residual functional capacity to perform medium work except he  
14 can occasionally climb ladders, ropes, or scaffolds; he can understand, remember, and apply  
15 detailed but not complex instructions; he cannot perform in a fast-paced production type  
16 environment; and he cannot interact with the general public and can occasionally interact with  
17 coworkers and supervisors. Tr. 37. The ALJ found plaintiff has no past relevant work but, as  
18 there are jobs that exist in significant numbers in the national economy that plaintiff could  
19 perform, he was not disabled. Tr. 44-46.

### 20 DISCUSSION

21 The Court will reverse the ALJ's decision only if it was not supported by substantial  
22 evidence in the record as a whole or if the ALJ applied the wrong legal standard. *Molina v.*

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<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

1 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). The ALJ’s decision may not be reversed on account  
2 of an error that is harmless. *Id.* at 1111. The Court may neither reweigh the evidence nor  
3 substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954  
4 (9th Cir. 2002). Where the evidence is susceptible to more than one rational interpretation, the  
5 Court must uphold the Commissioner’s interpretation. *Id.*

6 When a district court reverses an ALJ decision, it has discretion to either remand the case  
7 for further administrative proceedings or to remand for an award of benefits. 42 U.S.C. § 405(g);  
8 *Harman v. Apfel*, 211 F.3d 1172, 1177-78 (9th Cir. 2000). Where there are outstanding issues  
9 that must be resolved and it is not clear from the record an ALJ would be required to find a  
10 claimant disabled if all the evidence were properly evaluated, remand for further proceedings is  
11 appropriate. *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012).

12 The Court may remand for an award of benefits where (1) the record has been fully  
13 developed and further administrative proceedings would serve no useful purpose, (2) the ALJ has  
14 failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or  
15 medical opinion, and (3) if the improperly discredited evidence were credited as true, the ALJ  
16 would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995,  
17 1020 (9th Cir. 2014). Courts have flexibility in applying this rule and may instead remand for  
18 further proceedings where the record as a whole “creates serious doubt that a claimant is, in fact,  
19 disabled.” *Id.* at 1021.

20 The Court finds, if the improperly discredited evidence were credited as true, the ALJ  
21 would not be required to find plaintiff disabled on remand. Therefore, remand for further  
22 administrative proceedings is the appropriate remedy in this case.

1           **A.       Medical Evidence**

2           Plaintiff argues the ALJ failed to properly evaluate the opinions of Keith Kreuger, Ph.D.,  
3           Alexander Patterson, Psy.D., Peter Weiss, Ph.D., Quoc Ho, M.D., and Terilee Wingate, Ph.D.,  
4           along with a litany of other medical records that plaintiff asserts contain clinical findings  
5           consistent with these opinions; the prior administrative medical findings of Norman Staley,  
6           M.D., J.D. Fitterer, M.D., Vincent Gollogly, Ph.D., and Richard Borton, Ph.D.; and the opinion  
7           of Kimberly Wheeler, Ph.D., submitted to the Appeals Council after the ALJ's decision. Dkt. 15  
8           at 3-11.

9           The Commissioner concedes error but argues further administrative proceedings are  
10          warranted to assess this evidence because these opinions and prior administrative findings  
11          conflict with each other, and it is the province of the ALJ, not this Court, to resolve conflicts and  
12          ambiguities in the record. Dkt. 23 at 4. The Commissioner further argues that several of the  
13          opinions use ambiguous terms such as "difficulty," "mild," "moderate," and "marked," and it is  
14          the ALJ's responsibility to translate and incorporate such findings into a succinct RFC finding.  
15          *Id.* at 5. And with respect to specific opinions, the Commissioner asserts "there are sound reasons  
16          why an ALJ may take a different view of the evidence," giving reasons why an ALJ may find the  
17          opinions unpersuasive n remand. *Id.* at 6-12.

18          Plaintiff argues in reply the conflicts the Commissioner identifies do not actually justify  
19          or necessitate remand for another hearing, and many of the Commissioner's arguments as to the  
20          reasons why an ALJ could reject the opinions are improper post hoc rationales the Court cannot  
21          rely on. Dkt. 24 at 2. Plaintiff asserts the Court is evaluating the ALJ's current decision, not the  
22          possible decision of a new ALJ at a new hearing. Dkt 24 at 4-6. And plaintiff argues the fact the  
23          non-examining doctors' findings conflict with the opinions of Dr. Weiss and Dr. Wingate do not

1 preclude this Court from directing an award of benefits, asserting that every case that requires an  
2 ALJ hearing contains non-examiners' findings that support non-disability and that the  
3 Commissioner is therefore essentially arguing that the Court could never exercise its discretion  
4 to direct an award of benefits. Dkt. 24 at 6.

5 Both sides make arguments that misstate the nature of the Court's inquiry. The Court  
6 need not determine whether an ALJ might validly find the opinions unpersuasive on remand. Nor  
7 must the Court assess whether the reasons the Commissioner proposes are post hoc  
8 rationalizations. Instead, the Court is evaluating whether, if the disputed evidence is credited as  
9 true, an ALJ would be required to find plaintiff disabled on remand. *Garrison*, 759 F.3d at 1020.

10 Turning to that question, the Court finds there exist conflicts in the evidence that preclude  
11 an immediate award of benefits. The doctors whose opinions plaintiff asserts were erroneously  
12 evaluated expressed a range of opinions, ranging from none or mild limitations to marked or  
13 even severe limitations. For example, with respect to plaintiff's mental limitations, Dr. Kreuger  
14 opined plaintiff had none, mild, or moderate limitations in all areas of mental functioning (Tr.  
15 57-58), Dr. Patterson opined plaintiff's ability to function in the work setting was moderately  
16 impaired, and while he may have difficulty with attendance, timeliness, and managing work  
17 relationships and work-related stress, he would likely not have difficulty with completing work-  
18 related tasks (Tr. 570), and Dr. Gollogly and Dr. Borton opined plaintiff had mild or moderate  
19 limitations (Tr. 158, 173). Dr. Wingate, on the other hand, opined plaintiff had marked  
20 limitations in numerous areas and that the overall severity of his limitations was marked (Tr.  
21 951), and Dr. Wheeler likewise opined plaintiff had marked limitations in numerous areas and  
22 that the overall severity of his limitations was marked (Tr. 19). And in contrast with those  
23 opinions, Dr. Mitchell opined plaintiff had numerous severe limitations. Tr. 545. With respect to

1 plaintiff's physical impairments, while Dr. Ho opined plaintiff could perform less than sedentary  
2 work (Tr. 644-46), Dr. Staley and Dr. Fitterer opined plaintiff could perform light work (Tr. 160-  
3 62, 175-76).

4 If all these opinions were credited as true, an ALJ would not be able to find plaintiff  
5 disabled without first translating these varying and in some cases conflicting opinions into a  
6 single, succinct RFC finding and determining whether there are jobs that exist in significant  
7 numbers in the national economy a person with that RFC could perform. The Court cannot say  
8 the only possible outcome for an ALJ undertaking this task would be to find plaintiff disabled.

9 Plaintiff's assertion the conflicts the Commissioner identifies should not preclude an  
10 award of benefits asks this Court to do the very thing it cannot: weigh the evidence and resolve  
11 conflicts, in this case in favor of the plaintiff. And even if the Court agreed with plaintiff's  
12 assertion about the nature of non-examiners' findings and their effect on the Court's ability to  
13 direct an award of benefits, conflicts among the other medical opinions would still preclude a  
14 finding of disability. In other words, the Court cannot say, without making findings of fact and  
15 weighing the evidence, that the ALJ would be required to find plaintiff disabled if these opinions  
16 were credited as true. Accordingly, this case does not meet the requirements for an immediate  
17 award of benefits.

#### 18 **B. Plaintiff's Testimony**

19 Plaintiff also argues the ALJ failed to properly evaluate his testimony, arguing the ALJ's  
20 errors in assessing the medical evidence tainted his evaluation of plaintiff's testimony; the ALJ  
21 failed to identify meaningful inconsistencies between plaintiff's testimony and the medical  
22 evidence and provided a selective summary of the medical evidence; the ALJ improperly  
23 rejected his testimony based solely on the objective evidence; and the ALJ relied on plaintiff's

1 activities that were not transferrable to work and were not inconsistent with his testimony. Dkt.  
2 15 at 11-13.

3 The Commissioner contends the record contains conflicting evidence regarding plaintiff's  
4 subjective complaints and that on remand the ALJ could find plaintiff's testimony unpersuasive,  
5 giving reasons the ALJ might do so. Dkt. 13 at 12-16. The Commissioner again misstates the  
6 issue before the Court. The Court must assess whether the ALJ would be required to find  
7 plaintiff disabled on remand if plaintiff's testimony were credited as true, not possible reasons  
8 the ALJ could find plaintiff's testimony unpersuasive.

9 Turning to that question, the Court agrees with plaintiff the ALJ's errors in assessing the  
10 medical evidence undermine the ALJ's assessment of plaintiff's testimony, which relied in part  
11 on an assessment of the consistency between his testimony and the medical evidence. However,  
12 the Court cannot say that if plaintiff's testimony were credited as true, the ALJ would be  
13 required to find plaintiff disabled on remand. Rather, given the conflicts among the medical  
14 opinions discussed above and the possible effects the resolution of these conflicts may have on  
15 the assessment of plaintiff's testimony, the Court concludes it is necessary for the ALJ to  
16 reevaluate plaintiff's testimony in view of the ALJ's reevaluation of the medical opinions. The  
17 ALJ must consider all the evidence, resolve the conflicts and weigh the evidence in light of those  
18 considerations, and issue a new decision supported by all the evidence in the record.

### 19 C. Protective Filing Date

20 In 2015, plaintiff filed an application for disability benefits that was denied at the  
21 administrative level in 2019; this denial was affirmed on judicial review by this Court and by the  
22 Court of Appeals for the Ninth Circuit. Tr. 119, 146; *Stuck v. Saul*, 843 Fed. Appx. 970 (9th Cir.  
23 Apr. 15, 2021); *Stuck v. Comm'r of Soc. Sec.*, Case No. C19-5410-MLP, Dkt. 14 (W.D. Wash.

1 Jan. 21, 2020). As part of the application now before this Court, plaintiff sought to amend his  
2 protective filing date to June 7, 2018, the date plaintiff requested Appeals Council review of the  
3 prior ALJ decision, which was pending before the Ninth Circuit at the time the ALJ issued the  
4 decision at hand. Tr. 96, 441, 473-74. The ALJ denied that request, leaving March 19, 2019, as  
5 the protective filing date for this claim. Tr. 32.

6 Plaintiff noted these facts in his opening brief but did not assign error to or present  
7 argument on the issue. Dkt. 15 at 2, n.1. The Commissioner asserts plaintiff thus forfeited his  
8 opportunity to challenge the ALJ's denial of his request to amend his protective filing date. Dkt.  
9 23 at 17. In reply, plaintiff asserts the Commissioner did not provide any justification for  
10 refusing to honor his request to amend his protective filing date and this refusal was arbitrary and  
11 capricious. Dkt. 24 at 3. Plaintiff acknowledges he did not present argument on the issue in his  
12 opening brief but asks the Court to order the ALJ to consider the issue if it remands the case for  
13 further proceedings. *Id.*

14 The Court finds because plaintiff did not assign error to or present arguments on this  
15 issue in his opening brief, but instead presented arguments only in his reply brief, he has waived  
16 this issue. *See Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996); *Center for Sierra Nevada*  
17 *Conservation v. U.S. Forest Service*, 832 F.Supp.2d 1138, 1164, n. 4 (9th Cir. 2011). The Court  
18 will therefore not consider the issue and will not direct the ALJ to consider it on remand.

### 19 CONCLUSION

20 For the foregoing reasons, the Commissioner's final decision is **REVERSED**, and this  
21 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §  
22 405(g). On remand, the ALJ shall reevaluate the medical opinions, the prior administrative  
23 findings, and plaintiff's testimony, and shall offer plaintiff a new hearing, further develop the



1 record, and redo the five-step disability evaluation process as the ALJ deems necessary and  
2 appropriate to make a new decision.

3 DATED this 21st day of March, 2025.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge